

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ROBERT SAWYER,

Petitioner,

—v.—

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF *AMICUS CURIAE*,
NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., IN SUPPORT OF PETITIONER**

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BRIEF OF AMICUS CURIAE, NAACP
LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE¹

The NAACP Legal Defense and
Educational Fund, Inc., is a non-profit

¹ Letters from the parties
consenting to the filing of this Brief
have been lodged with the Clerk of the Court.

corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid without cost to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf.

Because race has been a consistent concern in the administration of capital sentencing statutes, the Fund has for many years been involved in the defense of persons charged with or convicted of capital crimes. Increasingly, death penalty litigation has required the Court to examine the operation of the federal habeas corpus process. Recently, for example, two of the Fund's clients have been before the Court in cases focusing on

nettlesome questions concerning habeas corpus procedures.²

The questions presented by Mr. Sawyer's case are such questions. In light of our experience in capital habeas litigation, we believe that our views on these questions can be of material aid to the Court in the disposition of Mr. Sawyer's case

SUMMARY OF ARGUMENT

In Mr. Sawyer's case, the Fifth Circuit's analysis of what constitutes a new constitutional rule of criminal procedure under Teague v. Lane, 103 L.Ed.2d 334 (1989) is in deep conflict with Teague's analysis. Teague adopted Justice Harlan's jurisprudence of retroactivity, which requires retroactive

² See Selva v. Collins, ___ U.S. ___, 58 U.S.L.W. 4221 (February 21, 1990); Zant v. Moore, ___ U.S. ___, 103 L.Ed.2d 922 (1989).

application of a new rule in cases that became final before the new rule was announced if, applying the constitutional standards that were in place at the time a habeas petitioner's conviction became final, "one could never say with any assurance that this Court would have ruled differently at [that time]." Desist v. United States, 394 U.S. 244, 263-64 (1969) (Harlan, J., dissenting). The Fifth Circuit's analytical framework, which was articulated and applied to bar the application of Caldwell v. Mississippi, 472 U.S. 320 (1985) in Mr. Sawyer's case, is radically different. It looks only at whether the rule announced in the subsequent case was different in any respect from the rule applied, or that probably would have been applied, at the time the case became final. If there is any material difference, retroactive

application of the new rule is barred. No inquiry is made -- as it is in Justice Harlan's analysis -- to determine whether the "new" rule would have been adopted by this Court at the time the petitioner's conviction became final had a case simply been before the Court which called for such a rule.

If Teague is to be viable, the Fifth Circuit's non-retroactivity ruling in Mr. Sawyer's case must be reversed. Utilizing the Teague-Harlan framework of analysis, one cannot "say with any assurance that this Court would have ruled differently [on the Caldwell issue] at the time [Mr. Sawyer's] conviction became final." Desist, 394 U.S. at 263-64. All of the constitutional standards utilized to decide Caldwell were equally available fourteen months before Caldwell was decided, the time at which Sawyer's

conviction became final. No new principle relevant to the Caldwell analysis emerged during that fourteen-month interval. Under Teague's analytical requirements, Caldwell is retroactively applicable in Mr. Sawyer's case.

In addition, the Fifth Circuit's framework for analyzing retroactivity will destroy the values subordinated to the interest in finality, yet still safeguarded, in Teague. First, persons similarly situated in relation to the evolution of constitutional principles, yet differently situated on the continuum of time, will be treated differently--solely because of the fortuity of the moment at which this Court decides to review a particular issue. There could be no more arbitrary or capricious basis upon which to classify persons' entitlement to the benefit of law. Second, at trial and

on appeal, prosecutors and state court judges will be encouraged to distinguish and not apply existing constitutional standards, for any colorable distinction will allow them to insulate convictions from federal habeas review in light of decisions announced by this Court after the convictions become final. The goal of federalism -- a joint state-federal partnership to "guard and protect rights secured by the Constitution," Ex parte Royall, 117 U.S. 241, 251 (1886) -- will be defeated in the process. Finally, federal habeas courts will not be allowed to determine whether the principles of constitutional law that were established at the time a petitioner's case became final could logically have been extended then to support a decision similar to one the Court announced thereafter. As a result, the lower federal courts will no

longer be able to play a role in the evolution of constitutionally based rules of criminal procedure. If these destructive consequences are deemed compatible with Teague, the wisdom of Teague will be drawn profoundly into question.

ARGUMENT

For purposes of Teague v. Lane, 103 L.Ed.2d 334 (1989), Robert Sawyer's case became final on April 2, 1984. Fourteen months later, the Court decided Caldwell v. Mississippi, 472 U.S. 320 (1985). The threshold question presented by Mr. Sawyer's challenge to his death sentence under Caldwell is whether the Caldwell decision enunciated "new law" that is nonretroactive within Teague.

A majority of the Fifth Circuit below held that Caldwell established new law. However, the analysis that led it to this

conclusion is at war with the doctrinal basis for the Court's decision in Teague. Further, it is so destructive of the values subordinated but nonetheless safeguarded by the Court in Teague that it calls into grave question the wisdom of Teague itself.

Respect for the doctrinal underpinnings of Teague and for the balance that it struck among the competing values surrounding retroactivity principles demands that the Fifth Circuit's ruling be set aside. If analyzed in keeping with the views of Justice Harlan, which the Court adopted in Teague, the rule of Caldwell is a classic example of the kind of rule which Justice Harlan would have applied retroactively: one that is "grounded upon fundamental principles whose content does not change dramatically from year to year, but whose

meanings are altered slowly and subtly as generation succeeds generation" -- a rule which is not new because "one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final." Desist v. United States, 394 U.S. 244, 263-64 (1969) (Harlan, J., dissenting).

A. The Fifth Circuit's Analytical Framework

The Fifth Circuit majority held that Caldwell established a new rule of constitutional law that could not be applied retroactively to Mr. Sawyer's case. Sawyer v. Butler, 881 F.2d 1273, 1290-91 (5th Cir. 1989) (en banc). The majority reached this result by comparing the substance of the rule announced in Caldwell with the rule of Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

It recognized that an Eighth

Amendment violation occurs under Caldwell when "the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere." 881 F.2d at 1286. Noting that this error could also have been attacked as a due process violation under Donnelly, the majority found that the primary difference between Caldwell and Donnelly was in the measure of prejudice required to establish a constitutional violation. Under Donnelly, a petitioner had to show that the prosecutor's argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process," 416 U.S. at 643; under Caldwell, the petitioner had to show only that the argument could have had some effect on the

sentencing decision, 472 U.S. at 341.³ The Fifth Circuit found that this aspect of Caldwell was new, because it "'was not dictated by precedent existing at the time the defendant's conviction became final,'" Sawyer v. Butler, 881 F.2d at 1291 (quoting Teague v. Lane, 103 L.Ed.2d at 349 (emphasis in original)) -- i.e., it was not dictated by Donnelly. Accordingly, the Fifth Circuit concluded that "Caldwell's greatly heightened intolerance of misleading jury argument is a new rule within the meaning of Teague." 881 F.2d at 1291.

B. The Doctrinal Underpinnings of Teague: Whether A Subsequently - Announced Rule Is New Must Be Determined By Whether This Court

³ The Caldwell Court phrased the test of prejudice in the negative: "Because we cannot say that [the prosecutor's argument] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." 472 U.S. at 341.

Would Have Ruled Differently At The Time The Petitioner's Conviction Became Final

The analytical process which led the Fifth Circuit to its conclusion in Sawyer was simple and straightforward. The court first identified the most nearly controlling single precedent which Sawyer could have cited at the time his case became final. That, it believed, was Donnelly. It then color-matched Donnelly and Caldwell to determine whether Caldwell held anything that, in comparison to Donnelly, was different or more advantageous to Mr. Sawyer. Finding that the measure of prejudice was such an element, the court declared that Caldwell established a new rule and thus could not be applied retroactively.

In sharp contrast to the Fifth Circuit's analytical framework, the framework espoused by Justice Harlan for

determining whether a rule announced by this Court after a case becomes final is "new" focuses on "the constitutional standards dominant at the time of [a petitioner's] conviction," and whether "the proper implications of th[ose] governing precedents" would have led the Court to announce the rule subsequently announced if it had decided the question before the petitioner's case became final. Desist v. United States, 394 U.S. at 268 (Harlan, J., dissenting). If in light of these "governing precedents," "one could never say with any assurance that this Court would have ruled differently at the time petitioner's conviction became final," the subsequently announced rule is not "new" and should be applied retroactively. Id. at 264.

Unlike the Fifth Circuit's approach to newness, Justice Harlan's approach

attempts to measure what all the relevant constitutional standards were at the time a petitioner's case became final, and to decide whether those standards would have supported the same rule that was later articulated in the supervening decision. The Fifth Circuit's approach measures only whether there is a difference between the rules articulated in cases before and after the petitioner's case became final. It does not examine whether any difference is the result of newly-evolved constitutional principles or simply fortuity. This kind of examination-- which goes to the heart of Justice Harlan's perspective -- can be conducted only by asking how the supervening case would have been decided at the time the petitioner's conviction became final.

Accordingly, Justice Harlan's approach, not the Fifth Circuit's

approach, is the one in keeping with the purpose of the retroactivity doctrine: "in adjudicating habeas petitions, ... to apply the law prevailing at the time a conviction became final," Teague, 103 L.Ed.2d at 353 (citation omitted). Anticipating the very approach to "new" law analysis that the Fifth Circuit adopted in Sawyer, Justice Harlan cautioned that the attractive simplicity of this approach should not be allowed to conceal its underlying inequity:

It is doubtless true that a habeas court encounters difficult and complex problems if it is required to chart out the proper implications of the governing precedents at the time of a petitioner's conviction. One may well argue that it is of paramount importance to make the "choice of law" problem on habeas as simple as possible, applying each "new" rule only to those cases pending at the time it is announced. While this would obviously be

simpler, simplicity would be purchased at the cost of compromising the principle that a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction.

Desist v. United States, 394 U.S. at 268.

In "adopt[ing] Justice Harlan's view of retroactivity for cases on collateral review," Teague v. Lane, 103 L.Ed.2d at 356, the Court plainly embraced these principles. The Teague plurality repeatedly referred to Justice Harlan's view that "'the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place,'" Teague, 103 L.Ed.2d at 353 (quoting Desist v. United States, 394 U.S. at 262-63 (Harlan, J., dissenting)), and that "'it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final...[,]" id.

(quoting Mackey v. United States, 401 U.S. 667, 689 (1971) (separate opinion of Harlan, J.)). Neither the Court nor Justice Harlan narrowed the retroactivity inquiry to a mere search for differences between decisions before and after the petitioner's case became final. Indeed, the Court's proponents of Justice Harlan's views have confirmed that the appropriate inquiry concerning the retroactivity of a decision announced after a petitioner's case has become final is: "how the Court would have decided this case at the time petitioner was convicted." Truesdale v. Aiken, 480 U.S. 527, 529 (1987) (Powell, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting).

C. The Fifth Circuit's Decision In Mr. Sawyer's Case Must Be Reversed If The Doctrinal Basis Of Teague Is To Be Preserved

As we have noted, in deciding Mr.

Sawyer's case the Fifth Circuit asked only whether, at the time Sawyer's case was tried or appealed, the specific prior holdings of this Court -- not the established, generalized principles of constitutional law -- would have provided the remedy to which he was entitled under Caldwell v. Mississippi. Finding that no existing decision would have provided the remedy he could obtain under Caldwell, the Fifth Circuit held that Caldwell announced a nonretroactive new rule. If the Fifth Circuit had instead asked the question Justice Harlan would have asked -- whether "one could ... say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final," Desist, 394 U.S. at 264 -- its conclusion concerning the retroactive application of Caldwell in Mr. Sawyer's case would have been

precisely the opposite.

To determine whether the Court would have ruled differently if it had been presented with the Caldwell question at the time Mr. Sawyer's conviction became final, one must examine the rationale for the Court's decision in Caldwell and whether that rationale would have been the same if the Caldwell question had been decided before April 2, 1984, the date on which Mr. Sawyer's conviction and sentence became final.

The rationale for the holding in Caldwell had five components. First, the Court reasoned that jurors who felt the full weight of responsibility for sentencing someone to death would act with utmost care in making a sentencing decision. 472 U.S. at 329-30. Second, the Court found that the exercise of sentencing discretion in this manner was

necessary to meet "the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" 472 U.S. at 330 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)). Third, the Court determined that the right to have all relevant mitigating factors considered could only be effectuated by the sentencer. If the sentencer felt less responsibility than it should for the sentencing decision, full consideration might not be given to mitigating circumstances. Caldwell, 472 U.S. at 330-31. Fourth, the Court found that the jury's mistakenly diminished sense of responsibility for the sentencing decision might lead it to impose a death sentence without determining that death was the appropriate sentence -- in order to "send a message" of extreme disapproval for the

defendant's acts" to the appellate court, 472 U.S. at 331, or to transfer the ultimate burden of the sentencing decision to the appellate court, 472 U.S. at 332-33, in the mistaken belief that the appellate court was at liberty to impose the most appropriate sentence. Id. In these circumstances, a death sentence could be imposed even though no one had made an individualized determination that the defendant's moral culpability was great enough to warrant death. 472 U.S. at 331-32, 333. Fifth, the Court found that misleading argument concerning the scope of appellate review of the sentencing decision created the risk that the jury would impose death "based on a wholly irrelevant factor": the "desire to avoid responsibility for its sentencing decision," which could be avoided only by imposing a reviewable sentence -- death.

472 U.S. at 332.

Each of these components was well-rooted in Eighth Amendment principles established before Mr. Sawyer was tried in September, 1980. Many were even more firmly established by the time his conviction and sentence became final on April 2, 1984. The assumption that jurors who felt the full weight of responsibility for sentencing someone to death would act with the greatest of care in exercising sentencing discretion had been accepted by the Court since at least 1971, when it was articulated in McGautha v. California, 402 U.S. 183, 208 (1971). In the Court's post-Furman Eighth Amendment jurisprudence, the need for jurors to exercise their capital sentencing discretion out of a full sense of the "awesome responsibility" they bore was "taken as a given." Caldwell v.

Mississippi, 472 U.S. at 329. The heightened need for reliability in the decision to impose a death sentence was universally accepted as an Eighth Amendment requirement during the entire time Mr. Sawyer's case was "non-final." See, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Lockett v. Ohio, 438 U.S. 586, 604-605 (1978); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982). Similarly, the right to have all relevant mitigating circumstances considered and given full effect by the sentencer was well settled before Mr. Sawyer's Teague date, Lockett v. Ohio, 438 U.S. at 604-06; Eddings v. Oklahoma, 455 U.S. at 110-17; see Penry v. Lynaugh, 106 L.Ed.2d 256, 276-78 (1989) (confirming the settled character of this right during the early 1980's), as was the right to an

individualized determination of the appropriateness of the death sentence, Woodson v. North Carolina, 428 U.S. at 303-304; Proffitt v. Florida, 428 U.S. 242, 251-52 (1976); Gregg v. Georgia, 428 U.S. 153, 197 (1976); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-37 (1977); Lockett v. Ohio, 438 U.S. at 601-605; Eddings v. Oklahoma, 455 U.S. at 110-12; Zant v. Stephens, 462 U.S. 862, 879 (1983), and the right to a sentencing process which minimized the risk that arbitrary or irrelevant factors could influence the outcome, Gregg v. Georgia, 428 U.S. at 189 (characterizing the consensus expressed by the Court in Furman v. Georgia, 408 U.S. 238 (1972)); id. at 206-207; Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980); Zant v. Stephens, 462 U.S. at 874-78.

Accordingly, all of the

constitutional principles which informed the Court's decision in Caldwell were established before Mr. Sawyer's case became final. During the fourteen-month interval between his case becoming final and the decision in Caldwell, no new principle of law emerged which had any bearing on the decision in Caldwell. There is no historical or analytical reason to suggest that the Court would have ruled differently on the Caldwell question if it had reached that question before Mr. Sawyer's conviction became final.⁴

⁴ The only principle which might conceivably have pointed to a different outcome on the Caldwell question was also available before Mr. Sawyer's case became final. In California v. Ramos, 463 U.S. 992 (1983), the Court held that the Constitution did not prohibit the states from giving a capital sentencing jury accurate information about post-sentencing procedures. To this extent, prosecutorial argument about appellate review -- even if it had the consequence of diminishing the jury's sense of

Within the framework adopted in Teague for determining whether a decision handed down after a habeas petitioner's case has become final announces a "new constitutional rule[]" of criminal procedure," Teague, 103 L.Ed.2d. at 356, Caldwell did not announce such a rule.

D. The Fifth Circuit's Decision Must Also Be Reversed Because It Is So Destructive Of The Values Subordinated By Teague That It Calls Into Question The Continuing Viability of Teague

In Teague, as well as in Justice

responsibility for the sentencing decision -- seemed to be sanctioned by Ramos. However, as both the plurality and concurring opinions made clear in Caldwell, Ramos did not imply that "States are free to expose capital sentencing juries to any information and argument regarding post sentencing procedures," no matter how inaccurate. 472 U.S. at 335 (plurality opinion). Accord id. at 342 (opinion of O'Connor, J., concurring). "Certainly, a misleading picture of the jury's role is not sanctioned by Ramos." Id. Thus, there was no settled constitutional principle at the time Mr. Sawyer's case became final that pointed to any outcome on the Caldwell question other than the outcome later reached in Caldwell.

Harlan's retroactivity jurisprudence, the criminal justice system's interest in finality is given paramount importance. See Teague v. Lane, 103 L.Ed.2d at 352-56; Mackey v. United States, 401 U.S. at 682-83 (separate opinion of Harlan, J.) Nevertheless, the values which are subordinated to the interest in finality are values about which the Court and Justice Harlan are also genuinely concerned. These include (1) the need for fairness and even-handedness in the adjudication of the claims of persons similarly situated, see Teague, 103 L.Ed. at 349-52; Mackey v. United States, 401 U.S. at 689; (2) the need to encourage prosecutors and state court judges to adhere in good faith to governing constitutional principles by "chart[ing] out [and honoring] the proper implications of the governing precedents," Desist v.

United States, 394 U.S. at 268 (Harlan, J., dissenting), rather than to give the narrowest possible reading to established constitutional principles, see Teague, 103 L.Ed.2d at 353; Desist v. United States, 394 U.S. at 262-63; and (3) the need to encourage the lower courts to continue to play an active and significant role in "developing or interpreting the Constitution." Mackey v. United States, 401 U.S. at 680. If affirmed, the Fifth Circuit's view of retroactivity will completely undermine these important values.

The interest in fair and even-handed adjudication of the claims of persons similarly situated is decimated by the Fifth Circuit's ruling, which provides no principled reason for the distinction that it draws between Robert Sawyer's case and Bobby Caldwell's case. In the

retroactivity jurisprudence of Justice Harlan, the only reason why it is fair to distinguish between habeas petitioners, whose cases have become final, and persons in trial or on direct appeal, whose cases have not become final, is that the constitutional principles that were established at the time of the habeas petitioner's trial or direct appeal would not then have supported the decision announcing the new rule. The evolution of legal principles that was needed to support the subsequent new rule decision distinguishes these two persons. While other definitions of fairness might call for the retroactive application of every new rule, see Mackey v. United States, 401 U.S. at 689, the Harlan jurisprudence does not do so. Instead, it makes a principled accommodation -- based on the evolution of law -- between the interests of finality

and fairness.

In contrast, the Fifth Circuit's jurisprudence makes no attempt to accommodate finality and fairness. It distinguishes habeas petitioners from persons whose cases are not final solely on the basis of irrelevant fortuities of timing -- the sheer accident of when this Court happens to review and decide a particular question. It makes no effort to root the significance of this difference of timing in the evolution of law and to treat persons similarly situated in relation to the determinative constitutional principles -- though differently situated in time -- similarly, as the Harlan approach does. Instead, it differentiates persons on the basis of flukes of timing that have absolutely no substantive significance. Nothing, we submit, could be more destructive of the

values of fairness and even-handedness which the Court sought to safeguard in Teague.

The second interest that is gravely jeopardized by the Fifth Circuit's distortion of Teague is the need to encourage prosecutors and lower courts to comply with established constitutional principles. As Justice Harlan recognized, "[T]he threat of habeas serves as a necessary incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." Desist v. United States, 394 U.S. at 262-63 (quoted with approval in Teague v. Lane, 103 L.Ed.2d at 353). The Fifth Circuit's decision in Sawyer substantially diminishes this incentive, for it encourages prosecutors and state judges to give the narrowest, most cramped

reading possible to established constitutional principles.

The reason for this is that the Fifth Circuit's decision puts an enormous premium on prosecutors' and state courts' efforts to limit the reach of established constitutional principles. Under the Fifth Circuit's jurisprudence, if prosecutors or state courts can distinguish existing constitutional precedents from their own cases by giving the narrowest possible reading to the principles underlying the precedential decisions, a habeas court will subsequently decide that existing precedent did not control, and that any subsequent controlling decision cannot be applied retroactively. Through this mechanism, the states can effectively insulate much of their criminal process from federal review.

Accordingly, instead of encouraging the states to honor their duty to "guard and protect rights secured by the Constitution," Ex parte Royall, 117 U.S. 241, 251 (1886) -- one of the purposes of retroactivity doctrine -- the Fifth Circuit's approach will actually discourage the states from seeking to protect constitutional rights. The very premise of federalism, that when "a State's judicial system...[is]...fairly accorded the opportunity to resolve federal issues arising in its courts," Huffman v. Pursue Ltd., 420 U.S. 592, 609 (1975), "state courts may become increasingly familiar with and hospitable toward federal constitutional issues," Rose v. Lundy, 455 U.S. 509, 519 (1982), will be eroded.

Finally, the Fifth Circuit's decision will effectively end any role of the lower

federal courts in the evolution of constitutional rules of criminal procedure. Under Sawyer, the only role for the lower courts in federal habeas proceedings will be to determine whether any of this Court's decisions that were announced before the petitioner's case became final squarely control any of the issues in his case. The federal habeas courts will not be allowed to determine whether principles of constitutional law that were established when a petitioner's case became final could logically have been extended at that time to support a decision in his case akin to one this Court announced thereafter (after the petitioner's case became final). Instead, federal habeas judges will be forced to assume the role condemned by Justice Harlan: they will be "reduced largely to the role of automatons, directed by us to

apply mechanistically all then-settled federal constitutional concepts to every case before them." Mackey v. United States, 401 U.S. at 413.

In essence, therefore, the Fifth Circuit's rule is a rule that will substantially interfere with the very function of judging. Lower court judges will not be allowed to ask whether the logic of existing constitutional principles extends to factual circumstances in which the principles have not previously been applied. At its core, this is what judging -- indeed, this is what our system of legal rules -- is all about. Justice Harlan was not simply describing the circumstances in which there should be retroactive application of supervening decisions when he wrote:

One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's

constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation.

Desist v. United States, 394 U.S. at 263. He was also describing the process of law, which is inherently evolutionary. It is a process from which Sawyer, if affirmed, would exclude federal habeas judges.

Conclusion

At bottom, the doctrine of retroactivity is a doctrine which seeks to classify cases in relation to the passage of time and the evolution of law. If at all relevant times in the progress of a case -- when closing arguments are made, when the direct appeal is pending, and, after the case has become final, when federal habeas proceedings are ongoing-- the conceptual structure of the law is

the same, a habeas petitioner is entitled to the application of a supervening decision by this Court which is supported by that conceptual structure. To deny the petitioner the benefit of such a supervening decision simply because it adds a new element to the rule of law is to turn the doctrine of retroactivity from a necessarily categorical but not irrational tool of classification into an unnecessarily arbitrary and irrational one. That is precisely what the Fifth Circuit accomplished in Mr. Sawyer's case.

For these reasons, the NAACP Legal Defense and Educational Fund, as amicus curiae, requests that the Court reverse the decision of the Fifth Circuit in Mr. Sawyer's case.

Respectfully submitted,

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